90-1224

No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

**MARK J. CONTRERAS, DONNA A. CONTRERAS, and ROBERT SCHMIDT,**

*Petitioners,*

v.

**CITIBANK (SOUTH DAKOTA), a National Banking Association, WILK & WALLER, an Illinois Partnership, RANDY KADET, SCOTT MARKS, MARILYN KADET, and ACCURATE PROCESS SERVICE,**

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

ANTHONY J. ONESTO
*Counsel of Record*
ONESTO, GIGLIO, MELTREGER & ASSOCIATES
6832 West North Avenue
Suite 4B
Chicago, Illinois 60635
(312) 889-1200

*Attorneys for Petitioners,*
MARK J. CONTRERAS,
DONNA A. CONTRERAS, and
ROBERT SCHMIDT

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

## QUESTIONS PRESENTED

1) Whether a person must exhaust all state court judicial remedies before bringing an action under 42 U.S.C. §1983.

2) Whether a person aggrieved by a void default judgment must establish a meritorious defense prior to its vacatur.

3) Whether a void state court judgment can be given collateral estoppel effect in a §1983 action seeking to collaterally attack that void judgment.

4) Whether a §1983 action can be used to collaterally attack a void judgment.

5) Whether a court-appointed process server engaging in blatant "sewer service" acts "under color of law" for purposes of 42 U.S.C. §1983.

## PARTIES TO THE PROCEEDING

This Petition seeks review of the decision of the Appellate Court of Illinois, First Judicial District affirming the decision of the Circuit Court of Cook County, County Department, Chancery Division, in action No. 87 CH 10028. Petitioners, Mark J. Contreras and Donna A. Contreras (husband and wife) and Robert Schmidt were the plaintiffs in the trial court.

Respondents, Citibank (South Dakota) N.A., a National Banking Association, has its principal place of business at 701 East 60th Street North, Sioux Falls, South Dakota; Wilk & Waller, an Illinois law partnership, has its principal place of business at 77 West Washington Street, Suite 407, Chicago, Illinois; and Accurate Process Service, a sole proprietorship, Randy Kadet, Scott Marks, and Marilyn Kadet, all have their principal place of business at 6237 North Albany Street, Chicago, Illinois.

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## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Mark Contreras and Donna Contreras (husband and wife) and Robert Schmidt ("Mark," "Donna," and "Robert," respectively, or Petitioners, collectively), respectfully pray that a Writ of Certiorari issue to review the judgment entered by the Appellate Court of Illinois, First Judicial District in this case.

## OPINIONS BELOW

Relevant excerpts of the trial court's rulings may be found in the Appendix at 12-23. The opinion of the Appellate Court of Illinois, First Judicial District is reported at *Contreras et al. v. Citibank (South Dakota) etc., et al.*, 198 Ill. App. 3d 1059, 556 N.E.2d 751, 145 Ill. Dec. 133 (1st Dist. 1990) and is reproduced in the Appendix at 1-10. The Illinois Supreme Court denied Petitioner's Petition For Leave To Appeal on October 3, 1990, and said order is reported at *Contreras et al. v. Citibank (South Dakota) etc., et al.*, ____ Ill. 2d ____, 561 N.E.2d 688, 149 Ill. Dec. 328 (1st Dist. 1990). A copy of that order is reproduced in the Appendix at 11. No petition for rehearing was filed.

## JURISDICTION

The judgment of the Appellate Court of Illinois is dated May 18, 1990. No Petition for Rehearing was filed. Petitioners timely filed a Petition For Leave to Appeal with the Illinois Supreme Court on June 22, 1990. The Illinois Supreme Court denied the Petition For Leave To Appeal in an order dated October 3, 1990. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

## STATUTES INVOLVED

The issues in this case involves the interpretation of the following statutory provision:

> 42 U.S.C. §1983—Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

### AN OVERVIEW

Petitioners are former credit account holders of Respondent Citibank who fell in arrears on their accounts and against whom Citibank initiated collection actions in the First Municipal District of the Circuit Court of Cook County, Illinois. In both collection suits, Citibank was represented by Respondent, Wilk & Waller, an Illinois law firm. After the Sheriff of Cook County filed his return indicating he was unable to effectuate service, Wilk & Waller employed Respondent Accurate Process Service

(an Illinois process serving company) to serve process. Wilk & Waller filed a motion to have either Respondent Randy Kadet or Respondent Scott Marks, employees of Accurate, appointed special process servers. Before the court could act on the motion and enter an order appointing Accurate, Kadet or Marks prepared a false affidavit of service; Respondent Marilyn Kadet (an notary public employed by Accurate) falsely notarized the affidavit of service; and Wilk & Waller filed the false affidavit of service with the clerk of the court. Thereafter, Wilk & Waller had the court enter an order appointing Kadet or Marks as special process server.

In both collection suits, the falsity of Accurate's return of service appeared on the face of the record insofar as the date and time of purported service set forth in the affidavit appended to the return fell sometime *after* the date and time stamp embossed on the return by the clerk of the court. Specifically, Kadet's return in Mark and Donna's case (*Citibank v. Contreras*, No. 87 M1 130654) was filed with the clerk of the court on July 2, 1987 at 9:56 a.m., but the affidavit showed service was had on July 13, 1987 at 7:27 p.m., some eleven days later. Kadet's return in Robert's case (*Citibank v. Schmidt*, No. 87 M1 102541) was filed with the clerk of the court on April 10, 1987, at 11:20 a.m., but the affidavit showed service was had on April 10, 1987 at 6:05 p.m., some six hours later. Copies of both returns can be found appended to Petitioner's Motion For An Extension of Time In Which to File A Petition For a Writ of Certiorari, filed with Honorable Court on December 26, 1990, Application A-896.

In both collection suits, a default judgment was entered against the petitioners based upon the false return of service. The default judgments included the amounts purportedly due Citibank, attorneys fees and court costs. Wage

garnishments were initiated. Wages were withheld from Mark and Robert.

**OTHER PROCEEDINGS IN *CITIBANK v. CONTRERAS* DEEMED RELEVANT BY THE APPELLATE COURT**

Upon learning of the wage garnishment, Mark and Donna contacted an attorney who filed a motion in the municipal court to vacate the default judgment. At the hearing on the motion, Mark and Donna argued proof of service was lacking on the face of the record and the default judgment must be vacated as void. The municipal court was more concerned with whether Mark and Donna had a meritorious defense, and seemed to suggest the default judgment would not be vacated in the absence of one. Thereupon Mark and Donna's attorney proffered 21 certified copies of similarly false affidavits of service, i.e., same plaintiff, same attorneys, same process servers and all filed with the clerk of the court some significant period of time before the time of purported service. The municipal court thereafter continued hearing on the motion to vacate for two weeks. A copy of the transcript of this hearing can be found in the Appendix at 12-17. During the two week interval, Wilk & Waller readily agreed that the default judgment against Mark and Donna should be vacated and declared void. On October 15, 1987, at approximately 2:00 p.m., the parties returned before the municipal court and entered an agreed order reciting: Kadet's affidavit of service was false; service was quashed; the court attained no jurisdiction over Mark and Donna; the default judgment was void; the wage deduction against Mark's employer was recalled. A copy of that order can be found appended to Petitioner's Motion For An Extension of Time In Which to File A Petition For a Writ of Certiorari, filed with Honorable Court on December 26, 1990, Application A-896.

## OTHER PROCEEDINGS IN *CITIBANK v. SCHMIDT* DEEMED RELEVANT BY THE APPELLATE COURT

Unlike Mark and Donna, Robert was not represented by an attorney in the municipal court and did not uncover the phony affidavit or the fraud perpetrated upon him. After the wage garnishment was initiated and wages deducted, Robert paid the balance of the judgment (including court costs and attorney's fees) to Citibank and procured a release from Wilk and Waller. Robert was originally contacted to provide an affidavit in Mark and Donna's case, and later consented to be a class action plaintiff.

## THE CLASS ACTION

Attorneys for the Petitioners have identified 34 other cases involving the Respondents wherein patently fraudulent service was used to procure default judgments which resulted in garnishments. In each case, the affidavit of service was filed with the clerk of the court prior to the time of purported service. (The Illinois Attorney Registration and Disciplinary Commission has since suggested to Petitioner's attorney that up to 120 cases may be similarly tainted.)

Accordingly, on October 15, 1987, at approximately 1:18 p.m. Petitioners filed a class action lawsuit on behalf of themselves and all other similarly situated in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, (No. 87 CH 10028) against Respondents Citibank, Wilk & Waller, Accurate Process Service, Randy Kadet, Scott Marks and Marilyn Kadet. Petitioner's sought compensatory and punitive damages under 42 U.S.C. §1983 for conspiracy to violate and violation of their due process rights. Co-incident to their prayer under 42 U.S.C. §1983, Petitioners sought a declaration that the judgments entered in the underlying municipal action were void.

(Petitioners Mark and Donna Contreras excluded themselves from this relief insofar as an agreed order was entered in their case declaring the judgment void.) Petitioners also sought a declaratory relief under state law declaring the judgments void for lack of jurisdiction and sought relief under a number of state causes of action.

**FINDINGS BY THE CHANCERY COURT**

The Chancery court first dismissed the class action complaint, *sua sponte*, with leave to file an amended complaint, holding it was without jurisdiction to declare the judgments of the municipal court void for lack of jurisdiction. *See* Appendix at 18-19. In ruling on the Petitioner's motion to reconsider the dismissal *sua sponte* the trial court again held it was without jurisdiction to declare void the judgment of another court of collateral jurisdiction and that petitioners only avenue of relief respecting the void default judgments was before the various municipal courts rendering the default judgments. *See* Appendix at 20-21. In ruling on Respondent's motion to dismiss the first amended complaint, the trial court held the relief sought (in the §1983 counts among others) of return of the sums wrongfully garnished was tantamount to a determination that the default judgments in the municipal division were void and that it was powerless to grant such relief. *See* Appendix at 22-23.

The Chancery court dismissed petitioner's §1983 claims as it was "persuaded by the more recent trend of the supreme court . . . , that the 'public function' conduct of a private party must be narrowly construed in finding state action." The Chancery court ignored a long line of cases cited by Petitioner which held private process servers are state actors (*see* pp. 23-25, *infra*) and found there was

no state action insofar as the process servers were private parties wrongfully using a statute for their own purposes. *See* Appendix at 22-23.

**DECISION OF THE APPELLATE COURT**

The Appellate Court of Illinois, First Judicial District agreed with the assessment of the Chancery court and held Petitioners were engaged in "forum shopping." Appendix at 9. This conclusion was based on Mark & Donna's having filed the class action complaint in the chancery division shortly before returning to the municipal court and "settling" the matter. The Appellate Court surmised Mark and Donna sought to avoid litigating the issue in the municipal division insofar as they were without a meritorious defense. Appendix at 8. In addition, the appellate court considered that Robert paid his judgment, secured a release and sought to undo the settlement. Appendix at 8. The appellate court also observed Robert did not allege a meritorious defense. Appendix at 8. The appellate court agreed the trial judge in the Chancery Division was powerless to declare void the judgments of the municipal courts. As to question of whether a court-appointed private process server "acts under color of state law" for purposes of 42 U.S.C. §1983, the appellate court held: "In view of our holding, it is unnecessary to address plaintiffs' arguments that various counts of the complaint were not subject to dismissal under section 2-615." *Contreras et al. v. Citibank (South Dakota) etc., et al.*, 198 Ill. App. 3d 1059, 1066, 556 N.E.2d 751, 754, 145 Ill. Dec. 133, 136 (1st Dist. 1990). *See* Appendix at 1-10.

## REASONS FOR GRANTING THE WRIT

### GENERAL OBSERVATIONS

From the outset, the principal problem with this litigation has been Petitioner's unfortunate choice to seek enforcement of their federal rights in a state court. The Illinois courts have myopically applied state decisional law without regard to their obligation to enforce federal rights or to the underlying purposes of §1983. No doubt Petitioners would not now find themselves before this august tribunal had this litigation been brought in the federal courts. Indeed, the rulings of the Illinois courts have repeatedly placed conditions upon Petitioner's vindication of their federal rights in no way contemplated by the Congress or this Honorable Court. *See Felder v. Casey*, 487 U.S. 131 (1988) (state statute conditioning vindication of federal rights held inapplicable to §1983 action brought in state court).

### PETITIONERS WERE NOT REQUIRED TO EXHAUST STATE JUDICIAL REMEDIES

The courts below held Petitioners only avenue of relief respecting the void judgments was before the municipal court's rendering those judgments. This suggests Petitioners must first exhaust all state remedies before bringing an action under §1983, if at all. This Honorable Court has never required a plaintiff in a §1983 action to exhaust his state judicial remedies. *See e.g. Ellis v. Dyson*, 421 U.S. 426, 432-433 (1975); *Steffel v. Thompson*, 415 U.S. 452, 472-473 (1974); and *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Indeed, as noted in *Felder*, Congress choose to provide persons aggrieved by a deprivation of their

civil rights *immediate* access to the federal courts, subject to the concurrent jurisdiction in the state courts. *Felder*, 487 U.S. at 147. Petitioners cannot be denied immediate vindication of their federal rights under §1983 simply because they elected to bring their lawsuit in a state court. Accordingly, the state court cannot limit Petitioner's to proceeding before the courts rendering the void judgments.

Parenthetically, Petitioners would add limiting relief only to the court rendering the void judgment is inconsistent with Illinois law as well. *See e.g.* Ill. Rev. Stat. ch. 110 §2-1401(f) ("Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.") *See also State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 497 N.E.2d 1156, 100 Ill. Dec. 794 (1986) (a void judgment may be attacked and vacated at any time, in any court.)

**PETITIONERS DID NOT HAVE TO ESTABLISH A MERITORIOUS DEFENSE IN THE MUNICIPAL ACTIONS, THUS UNDERCUTTING THE SPECTER OF FORUM SHOPPING RAISED BY THE APPELLATE COURT**

The appellate court labeled Petitioner's §1983 action as impermissible "forum shopping." The court inferred Petitioners were afraid to litigate their claims in the municipal courts because they could not establish a meritorious defense, and instead brought their §1983 action in search of a more favorable forum. This conclusion is based neither in law or in fact. Petitioners have throughout attacked the judgments rendered by the municipal courts as void for lack of service on the face of the record. As this court made crystalline in *Peralta v. Heights Medical Center*,

*Inc.*, 485 U.S. 80, 84 (1988), a judgment entered without notice or service is constitutionally infirm and conditioning its vacatur upon establishment of a meritorious defense is untenable. Moreover, Petitioners were in possession of twenty-one certified copies of identically phony affidavits of service, i.e., same plaintiff, same attorneys, same process servers and all filed with the municipal court long before the time of purported service. So convincing was the proof of fraudulent service that Wilk & Waller gladly agreed to the entry of an agreed order declaring the judgment in Mark and Donna's case void, a fact that the appellate court ignored. The appellate court also ignored that Robert was without the benefit of counsel, never uncovered the fraud and unwittingly paid the void judgment. In short, Petitioners were not forum shopping, but instead merely sought to vindicate their federal civil rights and those of the class they represent.

**THE COURTS BELOW ERRONEOUSLY GAVE THE UNDERLYING VOID JUDGMENTS COLLATERAL ESTOPPEL EFFECT IN THE §1983 ACTION**

The refusal of the Illinois courts to countenance a collateral attack of the void judgments rendered by the municipal courts in this §1983 action gives those void judgments collateral estoppel effect. This is directly contrary to a long line of this Honorable Court's precedent and again, altogether ignores the purposes underlying §1983.

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Honorable Court held the doctrine of collateral estoppel precluded a §1983 plaintiff from relitigating an issue actually litigated in a state court proceeding. Specifically, the court held a state court decision in a criminal proceeding adjudicating the constitutionality of an attendant search and seizure precluded the criminal defendant from subsequently bringing an action for damages arising from the same claimed

constitutional deprivation. Four years later, in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), this Court held the doctrine of collateral estoppel precluded a §1983 plaintiff from litigating a claim that could have been litigated in a related state court proceeding. Specifically, this Court held a §1983 plaintiff could not maintain her action where she had previously litigated the facts giving rise to the claim in a state court action and did not include the §1983 claim. Both opinions were careful to note, however, that the doctrine of collateral estoppel (issue preclusion or claim preclusion, respectively) did not apply to §1983 plaintiffs who did not have a full and fair opportunity to litigate the issue in the earlier state proceeding. *See Allen*, 449 U.S. at 95 (". . . collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case); and *Migra*, 465 U.S. at 84 (". . . petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court).

Consistent with this reasoning, this court unanimously decided in *Haring v. Prosise*, 462 U.S. 306 (1983), that a criminal defendant who pled guilty to a criminal charge was not foreclosed from subsequently bringing an action for damages under §1983 arising from a search and seizure attendant to the criminal prosecution. The doctrine of collateral estoppel did not prevent the §1983 action because ". . . the legality of the search . . . was not actually litigated in the criminal proceedings. . . . The criminal proceedings did not actually decide against [the §1983 Plaintiff] any issue on which he must prevail in order to establish his §1983 claim. . . . [N]one of the issues in the §1983 action could have been 'necessarily' determined in the criminal proceeding." *Id.* at 316.

Petitioners did not have a full and fair opportunity to litigate the basis of their §1983 claim in the underlying municipal actions nor could they procedurally. Under Illinois law, a person aggrieved by "sewer service" is limited to issuance of a rule to show cause against the process server. *See* Ill. Rev. Stat. ch. 110, §2-203(c) ("any person who knowingly sets forth in such certificate or affidavit any false statement, shall be liable in civil contempt.") Petitioners sought to vindicate their rights respecting not only the process servers, but the plaintiff in the underlying suits, the attorneys and the notary public. Under Illinois law, such relief could not be had in a counterclaim and had to be sought in a separate suit. *See Bio-Scientific Clinical Laboratory, Inc. v. Todd*, 149 Ill. App. 3d 845, 103 Ill. Dec. 171 (1st Dist. 1986) (counterclaim not permitted where it was directed against individuals not parties to the original action). Moreover, even if a counterclaim could have been filed in the municipal actions, the large number of potential plaintiffs mandated that this case be brought as a class action. Indeed, others similarly aggrieved could not have been joined to Mark and Donna's case or Robert's case. Local rules mandated a class action be brought in the Chancery Division. *See* General Order of the Circuit Court of Cook County 1.2, Section 2.1, II(a), "[t]he General Chancery Sections hears actions and proceedings, regardless of the amount of the claim, concerning class actions, . . . , [and] declaratory judgments, . . . .)

As previously noted, relief was sought against others not parties to the municipal actions. A determination of the validity of service in the underlying municipal actions would not necessarily assess the liability of the attorneys, the notary public or the plaintiff. Thus, there would have been no identity of parties. Moreover, the operative facts and legal principles to be applied differed between the

municipal action and an action under §1983. *See generally Montana v. United States*, 440 U.S. 147 (1979). On general principles of collateral estoppel, the underlying municipal judgments cannot be given preclusive effect in this cause.

Moreover, in creating §1983 Congress intended a federal remedy in three circumstances, among them ". . . where state procedural law was inadequate to allow *full* litigation of a constitutional claim,. . . ." *Allen*, 449 U.S. at 100-101, *citing*, *Monroe v. Pape*, 365 U.S. 167 (1961). (Emphasis supplied.) And it is for that reason that this Honorable Court has repeatedly recognized that ". . . additional exceptions to collateral estoppel may be warranted in §1983 actions in light of the 'understanding of §1983' that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights." *Haring*, 462 U.S. at 313-314. The facts of this case are prime among those for which §1983 was created. State law did not provide the mechanism for plenary redress of Petitioner's constitutional rights. The consideration to be afforded a §1983 action should be of no less effect because Petitioners seek redress of their federal rights in a state court. Accordingly, the void judgments rendered by the municipal court should not be afforded collateral estoppel effect in special consideration of the remedial purposes of §1983.

Even if the Illinois courts are correct as a matter of state procedural law (a contention Petitioners dispute), policy considerations underlying the supremacy of the federal civil rights laws mandate that state procedural law give way. *See Robertson v. Wegmann*, 436 U.S. 584, 589 ftnt. 5 (1978) and *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (in §1983 action, federal courts are free under §1988 to ignore state procedural law when such law is inconsistent with the Constitution and laws of the United States). *See also Howlett v. Rose*, 496 U.S. ____, 110 L.

Ed.2d 332 (1990) (Supremacy Clause mandates state courts cannot deny enforcement of a federal right and in enforcing the same, may apply their own procedural rules, unless those rules are pre-empted by federal law.)

**AN ACTION UNDER §1983 CAN BE USED TO COLLATERALLY ATTACK A VOID JUDGMENT**

The courts below held Petitioners improperly sought to collaterally attack the void judgments rendered in the municipal actions. To the contrary, this Honorable Court has implicitly recognized that a party can use §1983 to collaterally attack a patently void judgment. In *Schlesinger v. Councilman*, 420 U.S. 738 (1975), an army captain filed an action for declaratory relief collaterally attacking as void a pending court martial. In finding that an Article III court had jurisdiction to entertain the action, this Honorable Court recognized:

> . . . [c]ollateral attack seeks, as a necessary incident to relief otherwise within the court's power to grant, **a declaration that a judgment is void.** A judgment, however, is not rendered void merely by error, nor does the granting of collateral relief necessarily mean that the judgment is invalid for all purposes. On the contrary, it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences.

*Id.* at 746-747 (Emphasis supplied). *See also Ellis v. Dyson*, 421 U.S. 426 (1975) (§1983 action used to collaterally attack criminal conviction.) ". . . Void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject matter jurisdiction." *Schlesinger*, 420 U.S. at 749. This case is inapposite. From the outset, Petitioners have main-

tained the default judgments rendered by the municipal courts were void for lack of jurisdiction. As part of their prayer for relief, Petitioners sought a declaration that those judgments are void for lack of constitutionally mandated service of process, if not for all purposes, certainly for purposes of their §1983 action. Such a declaration would allow for compensatory damages, return of attorneys fees and court costs wrongfully taxed, and restoration of Petitioners' credit ratings which are indelibly marred by the judgment. *See United States v. Brand Jewelers*, 318 F.Supp. 1293 (S.D.N.Y. 1970) (government seeks among other things, a judgment declaring thousands of state default judgments void for lack of service in a suit under §1983). *See generally Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1985) (wrongful judgment is a lien on property, subjects party to garnishment and impacts on creditworthiness.) Such relief is certainly within the jurisdiction of the Chancery Division of the Circuit Court of Cook County. It is a court of general jurisdiction. *Lescher v. Barker*, 57 Ill. App. 3d 776, 15 Ill. Dec. 535 (1st Dist. 1978) (as divisions of the same constitutional court of general jurisdiction, each division of the circuit court has equal and concurrent subject matter jurisdiction.) Accordingly, the state court improperly dismissed plaintiff's §1983 action as an improper collateral attack.

**A COURT APPOINTED PRIVATE PROCESS SERVER ACTS UNDER COLOR OF STATE LAW**

The trial court held a court appointed private process server was not acting under color of law, but merely misusing a state statute. Appendix at 23. The court apparently misunderstood the impact of the cases to which it referred. Recall that the appellate court let this ruling stand without reviewing it. Appendix at 10. Private parties are liable under §1983 for misuse of state statutes when the misuse involves the power of the state in the deprivation of civil rights.

In *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982), this Honorable Court established a two part test by which to determine whether the action of a private party depriving the plaintiff of a constitutionally protected right may be fairly attributable to the state.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he has acted together with or has obtained significant aid from the state officials, or because his conduct is otherwise chargeable to the state.

*Id.* at 937. The Court was careful to note, "[a]lthough related, these two principles are not the same. They collapse into each other when the claim for constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions." *Id.* at 937. *See also Flagg Brothers Inc. v. Brooks*, 436 U.S. at 149, 157 ftnt. 5 (1978) (" 'The involvement of a state official . . . plainly provides the state action essential to show a direct violation of . . . [plaintiff's] Fourteenth Amendment . . . rights, whether or not action of the [official] were officially authorized, or lawful' "). The "state action" and "state actor" requirements diverge when the constitutional claim is directed against a party without the apparent authority of the state.

The court underscored the differences between the "state action" and "state actor" requirements by reference to past decisions. In *Moose Lodge, No. 107 v. Irvis*, 407 U.S. 163 (1972), this Court held the refusal of the Moose Lodge to serve dinner to Irvis, a black, based upon its bylaws which limited membership to white Caucasians was not actionable under section 1983 because its discriminatory policy could not be ascribed to a governmental

decision. That the state liquor control board licensed the Moose Lodge and authorized it to sell liquor did not provide the necessary "state action" since the regulation of the state was unconnected to the discriminatory policy.

The parameters of the "state actor" requirement were defined by review of *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). In that case,

> the Court, . . . , focused . . . on the character of the defendant to the section 1983 suit: Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a 'state actor.' The Court suggested that 'something more' which would convert the private party into a state actor might vary with the circumstances of the case. This was simply *a recognition* that the Court has articulated a number of different factors or tests in different contexts e.g. the 'public function' test, . . . ; the 'state compulsion' test, . . . ; the 'nexus' test, . . . ; and in the case of prejudgment attachments, a 'joint action test', . . . . Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here.

*Lugar*, 457 U.S. at 939 (Emphasis supplied). Thus, in *Lugar* the debtor was allowed to challenge the constitutionality of Edmondson's prejudgment attachment of his property because of the integral involvement of judicial and executive officers of the state. Conversely, in *Flagg Brothers*, the debtor was not allowed to challenge a warehouseman's decision to employ the state statutory system because it was not encouraged by the state and because the system did not require the aid of officers of the state. In short, the difference between *Lugar* and *Flagg Brothers* turned upon the involvement of state officers in aiding the private party in

the deprivation. *See Tulsa Professional Collections Services v. Pope*, 485 U.S. 478 (1988) (". . . when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.")

**The Official Character Of Court Appointed Process Servers Lends The Weight Of The State To Their Actions**

Petitioners submit that this case presents one of those situations noted by the *Lugar* court where the "state action" and "state actor" requirements collapse into one another. The official character of Kadet, Marks, and Accurate is such as to lend the weight of the state to their actions.

In Illinois, "[t]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." *Ill. Const. Art.* 6, Section 1 (1970). "Process" is the means used by the court to acquire or exercise jurisdiction over a person or over specific property. *Holiday Magic, Inc. v. Scott*, 4 Ill. App. 3d 962, 282 N.E.2d 452 (1st Dist. 1972). The court always has control of its own process. 30 Ill. Law & Prac., *Process*, Section 2 (1988). Indeed, Section 2-202 of the Illinois Code of Civil Procedure provides: "Process **shall** be served by a sheriff . . . . The **court may,** in its discretion upon motion, order service to be made by a private person over 18 years of age and not a party to the action." Ill. Rev. Stat. ch. 110, §2-202 (1988) (Emphasis supplied).

Under the Fourteenth Amendment, prior to an action which will affect an interest in life, liberty or property, ". . . a State must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an oppor-

tunity to present their objections.' ". *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1982), *quoting*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Thus, the proper service of process is clearly a function of the state.

The requirements of §2-202 foster the state interest in the efficient administration of justice and the constitutional mandate of the Fourteenth Amendment. Section 2-202 insures that the watchful eye of the state monitors the operation of its legal machinery. Kadet, Marks, and Accurate were duly-appointed officers of the court and acted as arms of the State of Illinois. Where they purposefully denied the class members of notice of the pendency of the collection lawsuits, it was as if the State of Illinois had done so. The deprivation of the class members' due process rights was done under color of law and is properly redressed under §1983.

The instant case is likened to *West v. Atkins*, 487 U.S. 42 (1988). In that case, plaintiff sued the state prison system for deprivation of his Eighth Amendment rights after a private physician under contract to the state prison system mistreated his injuries. Lower courts had dismissed the complaint, finding the actions of a private physician were not state action inasmuch as a physician exercised independent professional judgment. This Honorable Court reversed, finding: '[i]t is the physician's function with the state system, not his terms of employment, that determine whether his actions can be attributed to the State. . . . Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive State prisoners of the means to vindicate their Eighth Amendment rights." *Id.* at 55-56. So too in this case. Appointing a special process server does

not relieve the State of Illinois of its obligation to insure proper service of process nor does it deprive the class members of their means to vindicate that right under section 1983. *See also Del's Big Saver Foods, Inc. v. Carpenter's Cook, Inc.*, 795 F.2d 1344 (7th Cir. 1986) (state cannot avoid its obligation under the due process clause by delegating to private parties the authority to deprive people of their property without due process of law).

This Honorable Court remains especially sensitive to deprivations of due process rights by a state via its courts. In *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), the Court held unconstitutional a state statute barring probate claims not filed with the estate's representative within two months of issuance of letters of office because it did not require that notice be sent to known claimants. The estate urged the constitutionality of the statute, arguing it was a self-executing statute of limitations involving no state action. The Court disagreed, finding: "The probate court is intimately involved throughout and without that involvement the time bar is never activated. The nonclaim statute become operative only after probate proceedings have been commenced in a state court. The court must appoint the executor . . . [and] direct the executor to publish notice. . . Finally, copies of the notice and an affidavit of publication must be filed with the court. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." *Id.* at 487.

Given Illinois' statutory scheme for the appointment of special process servers, the Constitutionally imposed notice requirements on the State and this Honorable

Court's continued vigilance in safeguarding a litigant's right to notice of court proceedings, it is clear the actions of Kadet, Marks and Accurate were done under the color of state law.

**The Actions Of Court Appointed Process Servers Are Fairly Attributable To The State Under The *Lugar* Analysis**

Assuming for purposes of argument, this Honorable Court does not find the official character of Kadet, Marks and Accurate lends the weight of the State of Illinois to their actions, Petitioners submit that their actions may be fairly attributable to the state under the two-part test enunciated in *Lugar*.

In *Lugar* "state action" was found where the deprivation of a constitutional right was caused ". . . by a person for whom the state is responsible." *Id.* at 939. If the analysis in the foregoing section does little else, it clearly establishes the State of Illinois is responsible for the actions of those whom it appoints special process servers. Section 2-202 of the Illinois Code of Civil Procedure insures that only those meeting statutory requirements and approved and *appointed* by the court serve process in the stead of the sheriff. Accordingly, duly appointed special process servers are officers of the court and act as an arm of the state.

As defined in *Lugar*, a "state actor" is one who ". . . acts together with or has obtained significant aid from the state. . ." or whose conduct ". . . is otherwise chargeable to the state." *Id.* at 939. Restated, "state action" is private action with "something more." *Id.* The "something more" is found by resort to other tests previously established by the Court, such as (for these purposes) the "public function test" or the "joint action test." *Id.*

The Chancery judge in this case found the cases cited by Petitioners on state action on point, but found them tacitly overruled by *Lugar*. To the contrary, *Lugar* simply recast those cases as part of an analytical working tool with which to guide the fact oriented inquiry necessitated when private parties are charged with deprivation of constitutional rights under section 1983. (" 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance' ". *Lugar*, 457 U.S. at 939.) Thus, those cases cited by the Petitioners were not supplanted by *Lugar*, but rather are to be used within the context of the two part test enunciated by *Lugar*.

The cases cited by Petitioners to which the Chancery Court referred all held that private process servers who filed false affidavits of service were liable under the civil rights laws insofar as they performed "public functions." Those that conspired with them were likewise liable insofar as they "participated jointly" with them in a scheme to deprive others of their due process rights.

In *United States v. Wiseman*, 445 F.2d 792 (2nd Cir. 1971), defendants, professional private process servers, had been convicted under 18 U.S.C. §242 (the criminal counterpart of §1983) of routinely depriving inhabitants of the United States of their constitutional right to due process of law by signing blank affidavits of service which their employer would subsequently complete and file with the clerk of the court. Default judgments would then be taken against the persons named as defendants in the suits to which the affidavits of service related. Wage garnishments were initiated in a number of cases. On appeal, the defendants assailed their convictions arguing that their conduct, as private individuals, did not amount to state action. The Second Circuit found that defendants had engaged in state

action insofar as they performed a "public function" reserved to the state.

> Unlike most functions involved in the conduct of a lawsuit by private parties, the service of summons is essentially and traditionally a public function. . . . That the defendants sought to take advantage of their authority to perform this 'act of public power' by signing blank affidavits of service without actually effecting service does not remove their activities from the 'public' classification. Indeed, the signing of an 'affidavit of service' is as much a part of the exercising of the right to effect service of summons as is the act of service itself. Similarly, that defendants signed 'affidavits' in blank, rather than waiting until they were filled in and then swearing to the accuracy of the information contained therein as required by State law does not remove or lessen the 'public' nature of the act.

*Id.* at 796. *See also United States v. Barr*, 295 F.Supp. 889 (S.D.N.Y. 1969) (private process servers engaged in a public function in lieu of the sheriff and triggered the judicial machinery of the state by filing false affidavits of service); *United States v. Brand Jewelers*, 318 F.Supp. 1293 (S.D.N.Y. 1970) (private process servers engaged in "state action" in filing false affidavits of service); *Judo, Inc. v. Peet*, 326 N.Y.S.2d 441 (1971) (private process server filing false affidavit of service acts under color of state law); *Carrasco v. Klein*, 381 F.Supp. 782 (E.D.N.Y. 1974) (private process server, executing a false affidavit of service of summons on a defendant in a civil proceeding, may well be directly responsible for the absence of notice; such 'sewer service' is a denial of due process by one engaged in 'essentially and traditionally a public function.) The analysis in these New York cases is readily applicable to the instant case inasmuch as the Illinois

statute respecting service of process is identical to New York's. *See Scarver v. Allen*, 457 F.2d 308, 309 (7th Cir. 1972) (section 1983 action against process server for "sewer service" arising in Cook County).

The State of Illinois through the Circuit Court of Cook County, is responsible for its duly appointed process servers, Kadet, Marks and Accurate, thus satisfying the "state action" prong of the *Lugar* test. These private process servers engaged in a public function and set in motion the judicial machinery of the State of Illinois. Because of their unique position, occupied solely by the grace of the State of Illinois, these private process servers summarily denied the class members of their constitutional right to due process of law and stripped them of their property. This conduct, authorized or not, is chargeable to the State of Illinois and makes these private process servers "state actors" for purposes of the *Lugar* test. Under *Lugar* the co-existence of "state action" and a "state actor" make clear that the conduct of Kadet, Marks and Accurate are fairly attributable to the State of Illinois and that their actions were done under color of law for purposes of §1983.

The actions of Marilyn Kadet (notary public) and Wilk & Waller (attorneys) are likewise actionable under §1983. Both knowingly participated with the process servers in the deprivation of the class members' constitutional rights and are equally liable under §1983 as co-conspirators. *See Dennis v. Sparks*, 449 U.S. 24 (1980) (lawyers conspiring with judge to deprive plaintiff of due process in court proceedings liable under §1983); and *Mabe v. City of Galvaston Park etc.*, 635 F.Supp. 105, 108 (S.D. Tex. 1986) (within the context of individual dispute resolution, a private party acts under color of law when he or she corrupts judicial power.)

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

ANTHONY J. ONESTO
*Counsel of Record*
ONESTO, GIGLIO, MELTREGER
& ASSOCIATES
6832 West North Avenue
Suite 4B
Chicago, Illinois 60635
(312) 889-1200

*Attorneys for Petitioners,*
MARK J. CONTRERAS,
DONNA A. CONTRERAS, and
ROBERT SCHMIDT

# APPENDIX

[198 Ill. App. 3d 1059]

MARK J. CONTRERAS, *et al.*,
Plaintiffs-Appellants,
v.
CITIBANK (South Dakota) *et al.*,
Defendants-Appellees.

First District (6th Division) No. 1-88-3088

Judgment affirmed.

Opinion filed May 18, 1990

* * * * *

Appeal from the Circuit Court of Cook County; the Hon. Albert Green, Judge, presiding.

Onesto, Giglio, Meltreger & Associates, of Chicago, for appellants.

O'Connor & Schiff, of Chicago, and Donald S. Rothschild, of Oak Park, for appellees.

JUSTICE McNAMARA delivered the opinion of the court:

Plaintiffs Mark J. Contreras, Donna A. Contreras and Robert Schmidt brought a class action against defendants Citibank (South Dakota), Wilk & Waller, Randy Kadet, Scott Marks, Marilyn Kadet and Accurate Process Service, alleging fraudulent conduct relating to the collection, in separate proceedings, of delinquent credit card accounts. The trial court dismissed the complaint on the basis that it had no jurisdiction to declare the collection judgments void in this proceeding. Plaintiffs contend on appeal that the trial court had jurisdiction to declare the judgments void; that the court-appointed process servers acted under color of law; that plaintiffs sufficiently pled conspiracy;

that they sufficiently pled fraud and a violation of the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1987, ch. 121½, par. 261 *et seq.*); that there is a private right of action under the false affidavit of service statute and the wrongful wage deduction statute; and that they sufficiently pled negligent hiring.

The complaint alleges that the Contrerases held accounts with Citibank, and incurred debts to Citibank, which initiated collection actions on April 21, 1987, in the municipal division under the case name Citibank v. Contreras. The complaint further alleges that on May 27, 1987, the sheriff of Cook County returned the summons with an affidavit stating he was unable to serve the Contrerases.

On June 29, 1987, Wilk & Waller, a private process server acting on behalf of Citibank, had the clerk of the court issue an alias summons with a return date of August 11, 1987. It also set for hearing on July 13, 1987, an *ex parte* motion for appointment of Randy Kadet as special process server. Subsequently, Kadet prepared a false affidavit of service indicating he made substitute service on a Ms. Contreras, a female Hispanic, approximately 30 years of age, at 2300 North Mango, Chicago, on July 13, 1987, at 7:27 p.m. Marilyn Kadet notarized the affidavit, dated July 13, 1987. Randy Kadet returned the affidavit and alias summons to Wilk & Waller. On July 2, 1987, Wilk & Waller filed the papers, which showed the false service date of July 13, 1987, with the clerk of the court.

On July 13, 1987, the court appointed Randy Kadet as special process server. On August 11, 1987, a default was entered against the Contrerases. On August 25, 1987, judgment was entered against them on the default in the amount of $1,350.95 plus costs. On September 1, 1987, Wilk & Waller filed an affidavit for a wage deduction

order, and the clerk of the court issued a wage deduction summons to Mark Contreras' employer, the United States Post Office. On October 30, 1987, the employer withheld his wages.

In regard to Robert Schmidt, Wilk & Waller filed an action against him on behalf of Citibank on January 13, 1987, for collection of the balance outstanding on a VISA account. On February 23, 1987, the sheriff of Cook County returned the summons with an affidavit stating he could not serve it. On March 25, 1987, Wilk & Waller had the clerk of the court issue an alias summons with a return date of May 5, 1987. On April 3, 1987, Wilk & Waller set for hearing on April 10, 1987, an *ex parte* motion for appointment of Randy Kadet as special process server.

Subsequently, Kadet prepared a false affidavit of service indicating he made substitute service on a Mr. Schmidt, a white male, approximately 35 years of age, at 4304 North Francisco, Chicago, on April 10, 1987, at 6:05 p.m. Marilyn Kadet notarized the affidavit and dated it April 10, 1987.

At 11:20 a.m. on April 10, 1987, Wilk & Waller filed the alias summons and false affidavit of service with the clerk of the court. At 1:45 p.m. that day, Wilk & Waller had the court appoint Kadet as special process server.

On May 5, 1987, a default was entered against Schmidt. On May 19, 1987, judgment was entered on the default in the amount of $1,711.40 plus costs. On May 27, 1987, Wilk & Waller filed an affidavit for wage deduction order. The court issued a wage deduction summons to Schmidt's employer, the Chicago Park District, returnable on August 26, 1987.

The record includes a July 10, 1987, release of judgment filed by Wilk & Waller for Citibank, stating it had "re-

ceived full satisfaction and payment" from Schmidt. On August 18, 1987, a stipulation to dismiss the garnishment was filed. On August 26, 1987, conditional judgment was entered against the Chicago Park District in the amount of $1,821.76. Schmidt does not allege in either complaint that his wages were ever in fact garnished.

Plaintiffs' motion for leave to take discovery on the class stated that in reviewing 300 of the 1,500 collection cases filed in Cook County in 1987 by Wilk & Waller on behalf of Citibank, they discovered 34 cases in which the affidavit of service was filed on a date and time well in advance of the date and time of purported service.

In Citibank v. Contreras, on September 24, 1987, pursuant to section 2-1301(e) of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2-1301(e)), the Contreras filed a motion to vacate the judgment entered against them on August 25, 1987. A hearing on the motion to vacate was set for October 1, 1987, and was continued to October 15. The Contrerases also filed a special and limited appearance, a motion to quash service of summons, and a petition for a rule to show cause on the private process server under section 2-203 of the Code of Civil Procedure.

On October 13, 1987, the Contrerases moved for leave to withdraw the petition for a rule to show cause and filed an amended motion to quash. On October 15, 1987, at 1:18 p.m., they filed the present suit in the chancery division.

On the same day, at 2 p.m., the Contrerases appeared in the municipal division regarding Citibank v. Contreras and offered to pay Citibank the outstanding balance in full, as settlement and release of the Citibank v. Contreras action. Citibank accepted payment on the same day. The Contrerases then tendered a typewritten agreed order dis-

missing Citibank v. Contreras and withdrew all previously filed motions in that case.

Defendants in the present suit filed a motion to strike and dismiss all counts of the complaint. On December 2, 1987, Wilk & Waller filed a motion to disqualify plaintiffs' attorney and a motion to dismiss based on the argument that on October 1, 1987, the Contrerases submitted to the jurisdiction of the municipal division in Citibank v. Contreras, and later settled the suit, and were therefore disqualified as representatives of the class.

On January 27, 1988, an order was entered stating that the "court *sua sponte* dismissed plaintiffs' complaint." The court found it had no jurisdiction to vacate the judgments in the underlying actions and declare them void. The court stated:

> "While certain issue[s] are asserted which relate to jurisdiction, they relate to jurisdiction by means of perpetuating the fraud. Moreover, this is not a Court of Appeals, and neither party has addressed the propriety of a collateral attack on the judgments obtained in the Municipal Court. This Court concludes, therefore, that the plaintiff is not barred from asserting the facts presented as they related to the scheme of fraud, but the plaintiffs cannot ask this court to vacate the judgments in the Municipal Court or declare them void. The remedy, therefore, is dismissal pursuant to the Illinois Code of Civil Procedure, section 2-615, with leave to amend. This Court will dismiss the complaint *sua sponte* pursuant to 2-615."

On March 29, 1988, the court denied plaintiff's motion for reconsideration, finding that a section 2-1401 petition for relief from judgment should have been filed in the same proceeding in which the order of judgment was entered. The court stated: "In dismissing this matter previously, this court made clear that it's not to be substituted as a court of review. That is not its proper role."

In this class action, count I of the original complaint sought a declaratory judgment pursuant to section 2-701 (Ill. Rev. Stat. 1987, ch. 110, par. 2-701), declaring the default judgments void. Count II alleged conspiracy to violate civil rights by summarily denying due process of law and notice of the collection suits, in violation of 42 U.S.C. section 1983 (1986). Count III alleged a violation of the class members' civil rights. Count IV alleged common law fraud. Count V alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Count VI alleged an implied cause of action under section 2-203 (Ill. Rev. Stat. 1987, ch. 110, par. 2-203(c)). Count VII alleged a private cause of action under section 12-817 (Ill. Rev. Stat. 1987, ch. 110, par. 12-817). Count VIII alleged negligent hiring and failure to supervise. All counts sought a return of all moneys obtained as a result of the void judgments, plus compensatory and punitive damages.

On April 12, 1988, plaintiffs filed an amended complaint excluding count I, which sought a declaration in chancery that multiple municipal judgments were void. Each defendant filed a motion to strike and dismiss the first amended complaint.

On July 26, 1988, the first amended complaint was dismissed with leave to amend. The court addressed each count in the amended complaint. As to counts I and II, the court found plaintiffs failed to sufficiently allege State action. Counts III and IV alleging fraud were deficient because they failed to sufficiently allege defendants' intent that plaintiffs rely on their misrepresentations, and failed to plead damages. Count V was dismissed because there was no separate cause of action under section 2-603. Count VI was dismissed because section 12-208 could not be used where plaintiffs admitted their indebtedness to Citibank. Count VII alleging negligent hiring and super-

vision contained only conclusory statements and insufficient facts. The court then stated its alternative reason for dismissing the complaint:

> "Although plaintiffs argue otherwise, this court has determined that by way of the nature of the relief prayed for, returning sums obtained through the 'void' judgments, plaintiff continues to ask this court for relief which it is not empowered to grant. That is a determination that the default judgments rendered in the municipal division are void. This is akin to vacating the judgments. * * * Once more, * * * I am going to grant you the right to file a second amended complaint to see if you can meet muster. This case, if you can meet muster, should be transferred to the court of original jurisdiction wherein the judgments were entered."

On December 1, 1988, plaintiffs chose to stand on the amended complaint, and the court allowed the election to stand as to count I of the original complaint and as to all counts in the first amended complaint.

Plaintiffs contend that the chancery division of the trial court erred in concluding it had no power to vacate or declare void a judgment of the municipal division. Plaintiffs maintain the judgments in the underlying actions are void and that void judgments are subject to collateral attack at any time, in any court. Plaintiffs argue that the judgments are void because there was no personal jurisdiction, since they were never actually served, and because the judgments were procured through fraud.

Everything in this action is based on the judgments entered in the underlying suits. Plaintiffs seek to have those judgments declared void. Each count in their complaint asks for relief involving those judgments. The complaint seeks to compel Citibank and Wilk & Waller to return any money obtained as a result of "said void judg-

ments," and award the class $2,500,000 in compensatory damages and $5 million in punitive damages. The trial court properly explained that "plaintiffs paid the judgment voluntarily [in one court] yet seek to recoup the funds paid by having the judgment declared void" in another court. The record shows that the Contrerases paid the debt to defendant in full. The July 10, 1987, release of judgment for Schmidt's debt states that "full satisfaction and payment" was made to defendant. The trial court noted at the January 27, 1988, hearing on the motion to dismiss the complaint that as to Schmidt, "[j]ust like in the Contreras situation, a default judgment and wage garnishment followed, although the garnishment was dismissed on August 18, 1987." At the July 26, 1988, hearing on the motion to dismiss the first amended complaint, the court stated that the "named plaintiffs have excluded themselves from the return of any monies by Citibank and Wilk and Waller because they negotiated a settlement of Citibank's claim against them."

The simple answer is that plaintiffs should have made that attack in the underlying suits instead of bringing this separate action. Instead, the municipal division heard the Contrerases' (defendants in that case) motion to vacate the default judgment. The court repeatedly asked plaintiffs' counsel if there was a meritorious defense. Counsel refused to answer the question, insisting that the only question was whether the service of process affidavits were false. The court continued the case to permit plaintiffs to offer some proof that the affidavits were false. Instead, the Contrerases voluntarily paid the judgment. Schmidt's judgment was also paid, and he has alleged no meritorious defense.

Relief from a judgment entered in the trial court may be obtained under either section 2-1301(e) of the Code of

Civil Procedure (within 30 days of entry of judgment), or under section 2-1401 of the Code of Civil Procedure (after 30 days but before two years have passed). (Ill. Rev. Stat. 1987, ch. 110, pars. 2-1301(e), 2-1401.) Moreover, where a party seeks to contest personal jurisdiction, he must enter a special and limited appearance under section 2-301 of the Code of Civil Procedure. (Ill. Rev. Stat. 1987, ch. 110, par. 2-301.) This special appearance may be made after a judgment has been entered, thereby rendering the judgment void. *LaMotte v. Constantine* (1980), 92 Ill. App. 3d 216, 416 N.E.2d 23; *Washington v. Clayter* (1980), 91 Ill. App. 3d 489, 414 N.E.2d 1085.

Here, plaintiffs appeared in the underlying actions, and entered into settlement agreements, and the court released them from the default judgments. On October 15, 1987, the Contrerases filed the present suit attacking and seeking relief from the underlying judgment. Less than an hour later, in the municipal division they opted to abandon their motion to vacate under section 2-1301, and entered an agreed order of settlement. In effect, the three named plaintiffs asked the chancery division to review the municipal division's action. We find no law permitting such a review.

Plaintiffs are not seeking to enforce the judgments in the underlying suits. Instead, they are seeking to sidestep the municipal division's decisions in regard to the default judgments by going over to chancery as an alternate forum. Plaintiffs' attempt to rely on collateral attack here is merely forum shopping, which is not permitted under the law. Ill. Rev. Stat. 1987, ch. 110, par. 2-1002; *Balciunas v. Duff* (1983), 94 Ill. 2d 176, 446 N.E.2d 242.

Thus, we agree with the trial court's interpretation of the scope of collateral attack. Plaintiffs may not use collateral attack to circumvent the requirements of sections

2-1301, 2-1401 and 2-301 of the Code of Civil Procedure. The chancery division was without power to vacate the municipal division's judgments.

In view of our holding, it is unnecessary to address plaintiffs' argument that the various counts of the complaint were not subject to dismissal under section 2-615.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

EGAN and RAKOWSKI,* JJ., concur.

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* Justice William Quinlan participated in the above entitled cause prior to his resignation. Justice Thomas Rakowski was designed the third member of the panel and has read the briefs and listened to the tapes of oral argument.

*(Letterhead Of)*

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2036

October 3, 1990

Mr. Peter A. Regulski
Onesto, Giglio, Meltreger & Associates
6832 W. North Ave., S#4B
Chicago, IL 60635

No. 70405—Mark J. Contreras, et al., petitioners, v. Citibank (South Dakota), etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 1990.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

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| CITIBANK (SOUTH DAKOTA), | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 87 M1 130654 |
| | ) | |
| CONTRERAS, | ) | |
| | ) | |
| Defendants. | ) | |

REPORT OF THE PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable WILLIAM D. KELLY, one of the Downstate Judges, on the 1st day of October, A.D., 1987.

PRESENT:

MR. MICHAEL POLK,
Appeared on behalf of the Plaintiff,

MR. PETER REGULSKI,
Appeared on behalf of the Defendant.

THE CLERK: Citibank v. Contreras.

MR. REGULSKI: Good afternoon, your Honor.

My name is Peter Regulski, R-e-g-u-l-s-k-i, on behalf of Mark and Donna Contreras.

MR. POLK: Michael Polk on behalf of Citibank South Dakota, responding.

MR. REGULSKI: This is Defendant's motion to vacate default judgment entered August 25, 1987. If Your Honor will take a look at the summons and the affidavit filed

in return thereof, the Court will see there is a discrepancy as to the date. Accordingly, we will contend there was no service on these particular Defendants, and we will be asking that the default be vacated.

I am tendering to the Court a certified copy of summons and the return. If the Court will notice, it indicates it was filed On July 2nd at 9:56, and the affidavit supports thereof, service was July 13th, a discrepancy of better than 11 days.

I would submit, your Honor, therefore, that no service was had, and the default judgment should be vacated.

MR. POLK: Judge, in response, first of all, Judge, the summons was not issued until June 29th. It seems unlikely that it would be return service three days later. In addition, the half sheet, which is the official court record, reflects that alias summons was returned served on August 6th. I suggest to your Honor, on the change of the month, end of July, beginning of August, someone failed to time clock August 6th on the court file. In addition, there is no affidavit in the motion that would indicate there was no service, and I would advise the Court that between the date of service and the date judgment was taken, the Defendant made certain payments to Citibank. The amount of judgment was reduced to reflect those payments.

I suggest there was service, and Mr. Contreras is responding to the wage deduction that is ongoing to the U.S. Post Office.

MR. REGULSKI: I don't think there was a mistake in the clerk's office. The Court can take judicial notice that August 2nd is a Sunday. As we know, the clerk's office is not opened for business on Sundays.

MR. POLK: The official record of the Court, which is the half sheet, is that the summons was returned August 6th.

MR. REGULSKI: I submit to the Court the computer printout showing the activities in this case, and it indicates that the summons was returned on August 6th. So I again submit, there are some very serious questions on the date. All these things were done, and I ask this Court to vacate the default that was entered on the 25th of August.

THE COURT: Your motion says you have a good and meritorious defense to this. Is that correct?

MR. POLK: Counsel represented to me in the hallway what he is trying to do is avoid a judgment on the client's record. There is no defense.

THE COURT: Wait a minute. On your pleading, you said a good and meritorious defense. Counsel says that is not the case, which is it? It is one or the other. It is not both.

MR. REGULSKI: That may very well be true. The point of the matter is, Judge, there is a very serious question as to what is going on with these dates, and I think if we are going to be filing lawsuits, we have to follow the rules of procedure and the rules of Court.

THE COURT: I am all for that.

MR. REGULSKI: The rules of Court says you have to have personal service on a person before a default judgment can be entered. According to the record on the court file, I don't see we can say service was had on Mr. and Mrs. Contreras. There is no basis to enter default judgment, and I ask that the default judgment be vacated.

THE COURT: Get to the point, Counsel. Do you have a good and meritorious defense? Let's hear it.

MR. REGULSKI: Your Honor, I don't think we need to get into that.

THE COURT: I think we do. Let's hear it. You said in your motion that you have one. What is it?

MR. REGULSKI: Payment has been tendered.

MR. POLK: Not payment in full. The judgment was amended accordingly. We sued him for $1,450. The judgment was entered for an amount less than that. I submit to the Court, regardless of what the time stamped is, the official record, the half sheet, says it was served August 6th.

MR. REGULSKI: I submit to the Court 2-2036 [2-203(c)] of the Illinois Code of Civil Procedure that says, "Anytime a false affidavit has been submitted, that is contemptible conduct."

THE COURT: Can you prove it is false?

MR. REGULSKI: I think I will be able to, yes, sir.

THE COURT: Now?

MR. REGULSKI: Pardon me?

THE COURT: Can you prove it now?

MR. POLK: There is nothing in the record that indicates that it is false, Judge. It is an affidavit the special process server served.

MR. REGULSKI: Your Honor, I would be willing to concede that in certain cases, people make mistakes, but I would also submit that those mistakes happen infrequently.

I have here 21 certified copies of summons and returns and affidavits in support that are identical to that one; inasmuch as, they are filed on one day and served—and

service indicates that it was had on some other day, several days down the road.

I would submit this constitutes a pattern of abuse. Accordingly, I would submit that the same thing happened in this case. That affidavit has absolutely nothing to do with service on Mr. and Mrs. Contreras. It was made up, and it was filed.

I would submit to the Court, I have 20 certified copies of affidavits and returns of service that show the same type of abuse.

THE COURT: You have something from the Defendants saying they were not served on that date?

MR. REGULSKI: We were not served at all.

MR. POLK: There is no affidavit to that effect.

THE COURT: Was your affidavit in affect?

MR. REGULSKI: It appears on the face of the record.

If you want to continue this matter, I will bring Mr. and Mrs. Contreras in, and we will have them testify here.

MR. POLK: Judge, I would also point out, there is a discrepancy of Counsel's computer record, and what he states the time stamp is, the computer records shows it was July 6th. The file says July 2nd, and the official record docket shows August 6th. I suggest there is error in the clerk's office. There is no false affidavit.

MR. REGULSKI: I submit there—it can be filed on July 2nd, and several days later, they will input it in the computer what was done on a given day. That is probably unexplainable discrepancy. I have a difficult problem between July 2nd and July 13th.

THE COURT: I will enter and continue your motion for two weeks to the 15th at 2:00 p.m., to give you an opportunity to present evidence to show this return is not proper.

MR. REGULSKI: At the same time, I will be asking leave to file a special and limited appearance. A copy of which is being tendered to the Court and a copy to Counsel.

I will be submitting for the hearing, a motion to quash service of summons, and we will recall the wage deduction order, and I will be filing a petition to show cause against the process server, all for hearing the same day.

THE COURT: The record will show they have been filed.

MR. POLK: I would appreciate if Counsel would service me with copies of those.

MR. REGULSKI: You have your notice.

MR. POLK: I don't have copies of the pleadings.

MR. REGULSKI: I will have them stamped, and I will tender them in court.

Thank you for your consideration, your Honor.

MR. POLK: Judge, can I get a written response—affidavit prior to that time?

THE COURT: It is up to him, if he comes up with one.

MR. REGULSKI: Thank you for your consideration, your Honor.

(Proceedings concluded.)

[Certificate of Court Reporter omitted in printing.]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

| | | |
|---|---|---|
| MARK CONTRERAS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | No. 87 CH 10028 |
| | ) | |
| CITIBANK etc., et al., | ) | |
| | ) | |
| Defendants. | ) | |

REPORT OF THE PROCEEDINGS has at the hearing of the above-entitled cause before the Honorable ALBERT GREEN, Judge of said court, on the 27th day of January, 1988, at the hour of 10:30 a.m.

PRESENT:

MR. PETER A. REGULSKI appeared for the Plaintiffs;

MESSRS. SIDLEY & AUSTIN
BY: MR. JON I. FIELDMAN appeared for Citibank;

MESSRS. O'CONNOR & SCHIFF
BY: MS. LORETTA GRIFFIN appeared for Wilk & Waller;

DONALD S. ROTHSCHILD & ASSOCIATES
BY: MR. DONALD S. ROTHSCHILD and Mr. ELMER GERTZ appeared for Randy Kadet, Scott Mark, Marilyn Kadet and Accurate Process Service.

THE CLERK: Are all parties here on Contreras v. Citibank, 87 CH 10028

MR. FIELDMAN: Yes, Your Honor.

THE COURT: The matter comes up on a motion to strike and dismiss and a motion to disqualify.

(Thereafter followed brief remarks by counsel and a factual recitation by the court.)

THE COURT: It is true that the plaintiffs ask this Court to declare underlying judgments void. In effect, the plaintiffs seek to collaterally attack the judgments. This is a precarious position, and neither party has addressed this issue.

But the plaintiffs do not merely raise questions which concern or address the jurisdiction of the Court in the underlying action. The plaintiffs claim that the defendants conspired to and did participate in a fraud which had the effect of depriving the plaintiffs of their day in court and is some instances took away a portion of their wages.

While certain issue are asserted which relate to jurisdiction, they relate to jurisdiction by means of perpetuating the fraud. Moreover, this is not a Court of Appeals, and neither party has addressed the propriety of a collateral attack on the judgments obtained in the municipal court.

This Court concludes, therefore, that the plaintiff is not barred from asserting the facts presented as they relate to the scheme of fraud, but the plaintiffs cannot ask this Court to vacate the judgments in the municipal court or declare them void. The remedy, therefore, is dismissal pursuant to the Illinois Code of Civil Procedure, section 2-615, with leave to amend. This Court will dismiss the complaint sua sponte pursuant to 2-615.

(Thereafter followed additional remarks by the Court and counsel not relevant to the appeal.)

(Proceedings concluded)

[Certificate of Court Reporter omitted in printing.]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

| | | |
|---|---|---|
| MARK CONTRERAS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | No. 87 CH 10028 |
| | ) | |
| CITIBANK etc., et al., | ) | |
| | ) | |
| Defendants. | ) | |

REPORT OF THE PROCEEDINGS has at the hearing of the above-entitled cause before the Honorable ALBERT GREEN, Judge of said court, on the 29th day of March, 1988, at the hour of 10:00 a.m.

PRESENT:

MR. PETER A. REGULSKI appeared for the Plaintiffs;

MESSRS. SIDLEY & AUSTIN
BY: MR. JON I. FIELDMAN appeared for Citibank;

MESSRS. O'CONNOR & SCHIFF
BY: MS. LORETTA GRIFFIN appeared for Wilk & Waller;

DONALD S. ROTHSCHILD & ASSOCIATES
BY: MR. DONALD S. ROTHSCHILD appeared for Randy Kadet, Scott Mark, Marilyn Kadet and Accurate Process Service.

THE CLERK: Contreras versus Citibank, 87 CH 10028.

THE COURT: Matter comes up on motion for reconsideration. Identify yourselves for the record please.

(Thereafter followed brief remarks by counsel and a factual recitation by the court.)

This Court has thoroughly read all the pleadings, motions, responses and replies tendered in this matter. In dismissing this matter previously, this Court made clear that its not to be substituted as a court of review. That is not its proper role.

Section 2-1401 of the Illinois Code of Civil Procedure, Section B provides a petition for relief from judgments must be filed in the same proceedings in which the order of judgment was entered.

The cases cited by the plaintiffs do not address the situation presented at the case at bar and are, therefore, distinguishable. In this case, plaintiffs are asking this court to declare void the judgments obtained in a court of parallel jurisdiction. The plaintiffs have not presented one case in which a collateral attack was sustained in such a situation.

The motion for reconsideration will be denied. Prepare the appropriate order.

(Thereafter followed additional remarks by the Court and counsel not relevant to the appeal.)

(Proceedings concluded.)

[Certificate of Court Reporter omitted in printing.]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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| MARK CONTRERAS, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | No. 87 CH 10028 |
| | ) | |
| CITIBANK etc., et al., | ) | |
| | ) | |
| Defendants. | ) | |

REPORT OF THE PROCEEDINGS has at the hearing of the above-entitled cause before the Honorable ALBERT GREEN, Judge of said court, on the 26th day of July, 1988, at the hour of 11:00 a.m.

PRESENT:

MR. PETER A. REGULSKI appeared for the Plaintiffs;

MESSRS. SIDLEY & AUSTIN
BY: MR. JON I. FIELDMAN appeared for Citibank;

MESSRS. O'CONNOR & SCHIFF
BY: MR. ELLIOT R. SCHIFF appeared for Wilk & Waller;

DONALD S. ROTHSCHILD & ASSOCIATES
BY: MR. DONALD S. ROTHSCHILD and MR. ELMER GERTZ appeared for Randy Kadet, Scott Mark, Marilyn Kadet and Accurate Process Service.

THE COURT: Contreras versus Citibank, 87 CH 10028. The matter comes on a motion to strike and dismiss the first amended class action complaint.

Would you identify yourselves for the record.

(Thereafter followed brief remarks by counsel and a factual recitation by the court.)

THE COURT: This court agrees that many of the cases cited by the plaintiffs on the issue of state action are on point. However, it is persuaded by the more recent trend of the supreme court, as evidenced by the decisions defendants cite, that the "public function" conduct of a private party must be narrowly construed in finding state action. These cases indicate that the court did not intend state action to be found where a private party wrongfully uses a statute for its own purpose.

Accordingly, this court finds plaintiffs have not stated a claim for relief under 42 U.S.C. Section 1983.

(Thereafter followed additional remarks by the Court not relevant to the appeal.)

THE COURT: Although plaintiffs argue otherwise, this court has determined that by way of the nature of the relief prayed for, returning sums obtained through the "void" judgments, plaintiff continue to ask this court for relief which it is not empowered to grant. That is a determination that the default judgments rendered in the municipal division are void. This is akin to vacating those judgments.

For these reasons this court will dismiss plaintiffs' first amended complaint.

Once more, listen to me carefully, I am going to grant you the right to file a second amended complaint to see if you can meet muster. This case, if you can meet muster should be transferred to the court of original jurisdiction wherein the judgments were entered. Prepare the appropriate orders.

(Proceedings concluded.)

[Certificate of Court Reporter omitted in printing.]